SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, ~~1947~~ 1948

No. ~~780~~ 49

VALENTINE GOESAERT, MARGARET GOESAERT, GERTRUDE NADROSKE AND CAROLINE McMAHON,
Appellants,

vs.

OWEN J. CLEARY, FELIX H. H. FLYNN AND G. MENNAN WILLIAMS, MEMBERS OF THE LIQUOR CONTROL COMMISSION OF THE STATE OF MICHIGAN

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN.

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

EUGENE F. BLACK,
Attorney General of Michigan;
EDMUND E. SHEPHERD,
Solicitor General of Michigan;
DANIEL J. O'HARA,
CHARLES A. MARTIN,
Assistant Attorneys General of Michigan,
Counsel for Appellees.

INDEX

Subject Index

Table of Cases Cited

STATUTES CITED

UNITED STATES OF AMERICA
IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Civil Action No. 6618

VALENTINE GOESAERT, ET AL.,
Plaintiffs,

vs.

OWEN J. CLEARY, ET AL.,
Defendants

Civil Action No. 6619

GERTRUDE NADROSKE, ET AL.,
Plaintiffs,

vs.

OWEN J. CLEARY, ET AL.,
Defendants

APPELLEES' STATEMENT AS TO JURISDICTION AND MOTION TO DISMISS OR AFFIRM

The appellees, believing that the matters set forth below will demonstrate the lack of substance in the questions raised by this appeal, file this, their statement in opposition to appellants' statement as to jurisdiction. Appellees include herein their motion to dismiss the appeal, or in the alterna-

tive, to affirm the judgment of the District Court on the ground that the questions raised on behalf of appellants are so unsubstantial as not to need further argument.

While the cause is one which otherwise would be reviewable by the Supreme Court on direct appeal from the District Court, appellees assert that the unsubstantial character of the grounds stated by appellants is so apparent on the face of the record as to warrant the Court in summarily disposing of the appeal at this stage of the proceeding.

The matters here relied upon by appellees are more particularly stated below:

First: At the November election 1932 the people of Michigan ratified a proposed amendment to article 16, section 11 of the State Constitution, thereby repealed the liquor prohibition amendment of 1916 and provided in substance that the legislature might by law create a Liquor Control Commission who, subject to statutory limitations, should exercise complete control of the alcoholic beverage traffic within the State, including the retail sales thereof.

The Michigan Liquor Control Act of 1933 [1] created such a commission which, under an unbroken line of decisions of the State Supreme Court construing both the constitutional amendment and this statute,

Fitzpatrick v. *Liquor Control Commission*, 316 Mich. 83, and cases cited, 90,

became vested by the Constitution with plenary power to control the alcoholic beverage traffic, such power being subject to express statutory provisions or necessary implica-

[1] Act No. 3, Pub. Acts 1933, Ex. Sess., effective Dec. 15, 1933; Comp. laws Supp. 1935, §§ 9209-16 to 9209-72; Stat. Ann. §§ 18.971 to 18.1028. It may be noted that meanwhile, between the date of ratification of the constitutional amendment of 1932 and the effective date of the present law, Act No. 64, Pub. Acts 1933, effective April 27, functioned as a stop-gap measure.

tions limiting the exercise thereof that the legislature is empowered by the Constitution to enact.

Section 19a of the Liquor Control Act, the constitutional validity of which is attacked by the appellants, was added thereto by Act No. 133, Pub. Acts 1945 and given immediate effect on the 30th day of April.

Boiled down to its substance, and as construed by the Michigan Supreme Court in *Fitzpatrick, supra,* 316 Mich. at 89, "the foregoing section 19a limits the licensing of female bartenders to the wife and daughters of the male owner of a licensed liquor establishment." By it appellants are excluded from obtaining bartenders' licenses; and here, as in the case of Fitzpatrick, "they claim that this section is unconstitutional, that it bears no reasonable relation to the object of the legislation, that it is discriminatory as to them, class legislation, therefore, void."

On December 2, 1946, the Michigan Supreme Court, in the case of *Fitzpatrick* v. *Commission, supra,* held sec. 19a valid as against such objections. A rehearing was denied January 6, 1947, but the plaintiffs (not parties here) failed to make timely application for a writ of certiorari from the Supreme Court of the United States.

Likewise the Court in this cause, *Goesaert* v. *Cleary, et al.,* 74 Fed. Supp. 735, upheld the constitutional validity of sec. 19a of the Michigan Liquor Control Act, as against identical objections here urged.

Second: Since *Mugler* v. *Kansas,* 123 U. S. 623, the substantive power of a State to prevent the sale of intoxicating liquor has been undoubted,

Indianapolis Brewing Co. v. *Liquor Control Commission,* 305 U. S. 391, 394,

and the Supreme Court of the United States has recognized that the control of the liquor traffic is so peculiarly within the province of legislative powers that the regulation, or

even prohibitio. thereof, in many instances, does not deprive an individual of property without due process of law, or deny him equal protection of the laws,

Eberle v. *Michigan*, 232 U. S. 700.

No individual has a constitutional right to engage in the liquor business. "The police power of the State is fully competent to regulate the business—to mitigate its evils or to suppress it entirely. There is no inherent right in a citizen to thus sell intoxicating liquors by retail; it is not a privilege of a citizen of the State or of a citizen of the United States",

Crowley v. *Christensen*, 137 U. S. 86;

cf. Cronin v. *City of Denver*, 192 U. S. 108, 114.

Third: The majority opinion of the three-judge Court in this cause rests on sound principles firmly established by the Supreme Court of the United States.

1. It is based primarily upon the foregoing doctrine of this Court that a legislature of a State under its police power has the right to regulate and even prohibit the sale of intoxicating liquors. See cases cited above and

Ziffin v. *Reeves*, 308 U. S. 132.

2. The opinion is also founded on the principle that the equal protection clause of the 14th Amendment does not prohibit all classification *per se*,

Atchison, Topeka & Santa Fe R. Co. v. *Matthews*, 174 U. S. 96.

"A long line of decisions by this Court had also settled that in the exercise of the police power reasonable classification may be freely applied and that regulation is not violative of the equal protection clause merely because it is not all-embracing. *Adams v. Mil-*

waukee, 228 U. S. 572. *Miller v. Wilson*, 236 U. S. 373, 384."

Zucht v. *King*, 260 U. S. 174, 176-177, declining jurisdiction because the constitutional question was not substantial in character.

3. It accepted and applied the standard rules laid down down by the Supreme Court of the United States for determining whether a statute is arbitrary in its classification and therefore denies the equal protection of the laws,

Lindsley v. *Natural Carbonic Gas Co.*, 220 U. S. 61, 78;
Carmichael v. *So. Coal & Coke Co.*, 301 U. S. 495, 510;
New York Rapid Transit Corp. v. *City of New York*, 303 U. S. 573.

4. The opinion is also correct in applying the rule that courts are not concerned with the wisdom of legislation. As Mr. Justice Cardozo so well said when speaking for the Court:

"The judicial function is exhausted with the discovery that the relation between means and end is not wholly vain and fanciful, an illusory pretense. Within the field where men of reason may reasonably differ, the legislature must have its way."

Williams v. *Mayor*, 289 U. S. 36, 42.

And see,

Nebbia v. *New York*, 291 U. S. 502.

5. In overruling appellants' objection that the legislature may not deny any woman the privilege of being employed as a bartender, if the right to engage in such employment is given to any group of women, the majority opinion of the three-judge Court relied on the following principles many times asserted by the Supreme Court of the United States.

"There is no requirement that the State must extend its regulation to all cases which could be reached

and improved by appropriate legislation, in order to sustain the constitutional validity of regulations for the correction of a wrong which in its experience is indicated." Citing:

Miller v. *Wilson*, 236 U. S. 373, 384;
Bosley v. *McLaughlin*, 236 U. S. 385;
Farmers Bank v. *Federal Reserve Bank*, 262 U. S. 649, 661;
Sproles v. *Binford*, 286 U. S. 374, 396.

"When the classification in such a law (enacted in exercise of the police power) is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed. . . . One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary."

Lindsley v. *Natural Carbonic Gas Co., supra.*

"Indeed, it has long been the law under the Fourteenth Amendment that 'a distinction in legislation is not arbitrary, if any state of facts reasonably can be conceived that would sustain it' (citing cases) . . .".

New York Rapid Transit Corp. v. *City of New York, supra.*

And, in applying the foregoing principles, the majority of the three-judge Court found several states of fact that the legislature of Michigan could have reasonably conceived to sustain the "barmaid classification," 74 Fed. Supp. at p. 738-739, starting at foot of second column on page 738, headnotes 8-11.

Fourth: On the other hand, the dissenting opinion of the three-judge Court, 74 Fed. Supp. 740-744, spends itself in criticizing the legislative policy without citing a single decision of this Court striking down a similar law. The dissent admits that a liquor licensee had no property rights in his license to engage in that traffic and then goes on to

base a major conclusion on the statement that sec. 19a of the Michigan Liquor Control Act violates the property rights of a licensee.

Of the decisions by the Supreme Court of the United States cited in the dissenting opinion,

Ohio ex rel. Lloyd v. *Dollison*, 194 U. S. 445, held that the power of the State over the liquor traffic is such that the traffic may be absolutely prohibited, and that being so it may be prohibited conditionally and a local option law does not necessarily deny to any person equal protection of the laws;

Dobbins v. *Los Angeles*, 195 U. S. 223, declared void a municipal zoning ordinance;

Watson v. *Maryland*, 218 U. S. 173, upheld the medical registration law of Maryland as against the objection that it denied equal protection of the law because it contained a grandfather clause;

Liggett v. *Baldridge*, 278 U. S. 105, held in violation of the due process clause of the 14th Amendment, a State enactment forbidding any corporation to own a pharmacy or drug store unless all of its stockholders were licensed pharmacists.

And the cases cited by appellants as sustaining the jurisdiction of the Supreme Court,

Looney, Attorney General, v. *Crane Co.*, 245 U. S. 178;
Sterling, Governor, v. *Constantin*, 287 U. S. 378, and
Parker v. *Brown*, 317 U. S. 341,

seem to us at least rather far from the point.

In the *Looney* case, *supra*, the Court held that "neither the right of a State to attach conditions when licensing a sister state corporation to do local business, nor its power to tax the corporation in respect of such business, when licensed, can sustain impositions which, in the guise of permit charges

or excise taxes, result in direct burdens on interstate commerce or in the taxation of property beyond the confines and jurisdiction of the state."

The case of *Sterling, Governor*, v. *Constantin, supra*, the Court affirmed an order of interlocutory injunction granted by a three-judge District Court, restraining the Governor and certain military officials of Texas from enforcing military orders restricting the production of plaintiffs' oil wells, and a final decree of the same court making the injunction permanent.

And *Parker* v. *Brown, supra*, sustained the constitutional validity of the California Agricultural Prorate Act and a prorate marketing program adopted thereunder by the State for regulating the handling, disposition, and prices of raisins produced in California, a large part of which go into interstate and foreign commerce, as against the charge that such a program was rendered invalid (1) by the Sherman Act, (2) by the Agricultural Marketing Agreement Act of 1937, as amended, 7 U. S. C. §§ 601, et seq., or (3) by the Commerce Clause of the Constitution.

Fifth: Finally, we respectfully submit, it comes down to this: seven justices of the Supreme Court of the State of Michigan unanimously agreed with a local circuit judge whose decree they affirmed on appeal, *Fitzpatrick* v. *Liquor Control Commission, supra*, that since there was a fair and substantial basis for the classification, the provision of § 19a of the Liquor Control Act, *supra*, prohibiting women, except wives or daughters of male licensees, from acting as bartenders was not an unconstitutional discrimination against women thereby barred from such occupation; the majority constituting the three-judge Federal District Court in this cause, *Goesaert* v. *Cleary, supra*, found at least four conceivable states of fact to sustain such a classification. Thus, there was one lone dissenter out of 11 jurists, 7 Michi-

gan justices, one Michigan circuit judge, and three Michigan Federal judges, and those who signed the majority opinions were guided by the foregoing decisions by the Supreme Court of the United States.

Wherefore, appellees respectfully submit this statement showing that the questions upon which the decision of this cause depends are so unsubstantial as not to need further argument, and appellees respectfully move the Court to dismiss this appeal or, in the alternative, to affirm the order and decree entered below.

Respectfully submitted,

EUGENE F. BLACK,
Attorney General of the State of Michigan;
EDMUND E. SHEPHERD,
Solicitor General of the State of Michigan;
DANIEL J. O'HARA,
CHARLES M. A. MARTIN,
Assistant Attorneys General,
Counsel for Appellees.